K. J. BARLOW v. PUBLIC PROSECUTOR
B. G. CHAMBERS v. PUBLIC PROSECUTOR

[S.C. (Salleh Abas L.P., Seah & Abdoolcader S.C. JJ.) December 16, 17 & 18, 1985]

[Kuala Lumpur – Supreme Court Criminal Appeal Nos. 35 & 36 of 1985]

Criminal Law and Procedure – Charge of trafficking in dangerous drug – Submission of no case to meet at end of prosecution case – Duty of Court – Evidence for defence – Dangerous Drugs Act, ss. 37 and 39.

In this case the two appellants had been found guilty of trafficking in a dangerous drug and sentenced to death. It was submitted by counsel for the appellants that the learned trial judge should have accepted counsel's submission of no case to meet at the end of the prosecution case; the learned judge should have given reasons in his grounds of judgment why he called upon the appellants to answer the charge; and the learned judge should not at that stage come to the conclusion that the prosecution witness was a witness of truth.

Held: (1) upon the evidence in the case the learned judge was right to come to the conclusion at the end of the prosecution case that the charge of common intention to traffic the drug was made out which if unrebutted would warrant the conviction of the appellants, both within the principles laid down by the Privy Council in *Haw Tua Tau* v. *Public Prosecutor*(1) and *Mahbub Shah* v. *King Emperor*(2);

(2) in the context of the learned judge's grounds as a whole he meant no more than that he accepted the evidence of the three prosecution witnesses as being credible. Even however accepting that the learned judge in this regard went beyond the parameters of *Haw Tua Tau*(1) there was no substantial miscarriage of justice on the evidence adduced and this was a proper case for the application of the proviso to section 60(1) of the Courts of Judicature Act, 1964;

(3) looking at the evidence for the defence in this case it would appear to strengthen the case for the prosecution rather than detracting from it. There could be no justification to interfere with the learned judge's findings.

[*Editorial Note:* Both appellants' applications for clemency were refused by the Yang di-Pertua Negeri of Penang on June 21, 1986.]

Cases referred to:

(1) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.
(2) *Mahbub Shah* v. *King Emperor* L.R. 72 I.A. 148.
(3) *Dato Mokhtar Hashim & Anor.* v. *Public Prosecutor* [1983] 2 M.L.J. 232, 279-283.
(4) *Anderson* v. *R.* [1972] A.C. 100, 108.

SUPREME COURT.

Karpal Singh for the appellant, Barlow.

R. Rajasingam for the appellant, Chambers.

Mohtar bin Abdullah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the judgment of the Court): The first complaint raised by counsel for the appellants is that the learned trial judge should have accepted counsel's submission of no case to answer at the end of the prosecution case; the case against Barlow being itself rebutted by the prosecution's own evidence; the learned judge should have given reasons in his grounds of judgment why he called upon the appellants to answer the charge; and the learned judge should not at that stage come to the conclusion that PW2, ASP Abu Shahriman was a witness of truth.

To deal with this submission, we must deal with the charge with which they were tried and convicted of and the evidence which must be proved by the prosecution in order to constitute a *prima facie* case, which if unrebutted would warrant a conviction.

As to the charge the appellants Barlow and Chambers were charged with acting together in common intention to traffic 179.56 grammes of heroin at Penang International Airport on November 9, 1983 at about 4.30 p.m.; this being an offence under section 39B(2) of the Dangerous Drugs Act read with section 34 of the Penal Code.

Under section 37(a) of the Act, if any person is proved to have had in his custody or under his control anything whatsoever containing any dangerous drug, he shall be deemed to have been in possession of the drug and to have known the nature of it, until the contrary is proved.

Further under paragraph (da) of the same section if any person is in possession of 15 grammes or more in weight of heroin, he shall be deemed to be trafficking the said drug, unless he proves to the contrary.

The quantity of heroin in this appeal is far in excess of 15 grammes, thus raising a presumption of trafficking against any person found in possession of it.

The case for the prosecution is that both the appellants, Barlow and Chambers had possession and knowledge of the drug, because both had control and custody of the suitcase (P5) in which a soft layered bag (P7) containing the drug in question was found.

What then is the evidence adduced by the prosecution to show that both the appellants had possession and knowledge of the drug?:

(1) They were staying at Town House Hotel in Penang, both sharing a room, room No. 47, from November 4 to November 9, 1983;
(2) They arrived together in a taxi at the Penang International Airport at about 4.30 p.m. on November 9, 1983;
(3) Alighting from the taxi, Barlow and Chambers went in two different directions;
(4) Barlow carried a suitcase (P5) and a transistor radio (P6), whilst Chambers carried a bag (P3) and a sling bag (P4);
(5) Barlow went round and took a longer route to reach MAS (Malaysian Airlines System) first class counter and checked in P5 without having it scanned as his personal luggage, whilst Chambers went to the baggage scanner and had P3 scanned before checking it in at another MAS first class counter; there being two first class counters. The luggage tags were attached to those two pieces of luggage and their counterfoils clipped to their respective tickets. Their seats were allotted as shown in their boarding passes.
(6) Subsequently ASP Shahriman who had been keeping watch on them since their arrival at the airport approached them, identified himself and asked them to produce their passports. When the passports were produced and having noted their nationality, he returned the passports to them and asked them to retrieve P5 and P3 from the checked-in counters and to follow the ASP with the luggage to a checking room on the mezzanine floor of the airport building.
(7) Whilst in the checking room upon being asked by ASP Shahriman to open the bags he was carrying, namely P3 and P4, Chambers refused saying that these bags belonged to Barlow. So Barlow opened them but nothing incriminating was found in them. Barlow did so spontaneously and without hesitation (p.15D). Next when Barlow was asked to open P5 which he was carrying, his response was that he could not do so because P5 was not his. Subsequently, the ASP turned to Chambers, who finally opened it without difficulty (p.15A). Inside P5, another bag, a blue soft-layered bag (P7) was found and in it the quantity of drug, the subject matter of the charge, was found. As a result of this discovery, both the appellants were placed under arrest, and later brought to Bayan Lepas Police Station before finally being taken to Penang Police Headquarters.
(8) The two first-class tickets from Penang to Kuala Lumpur for the use of them were purchased in cash by Barlow on the same day, November 9, 1983.
(9) Clothings belonging to the appellant were in each other's bag, (P5) and (P3). Some of Barlow's belongings were in (P5) which was carried by him and some of Chambers' belongings were in (P3).
(10) The conduct of Barlow, when accosted by ASP Shahriman was that he appeared to be shivering, disturbed and uneasy.

Upon this evidence we are of the opinion that the learned judge was right to come to the conclusion at the end of the prosecution case that the charge of common intention to traffic the drug was made out, which if unrebutted would warrant the appellants' conviction, both within the principles laid down by the Privy Council in *Haw Tua Tau* v. *Public Prosecutor*[1] and *Mahbub Shah* v. *King Emperor.*[2] This evidence clearly shows that the drug was carried by Barlow pursuant to their pre-arranged plan, *i.e.* to take it out of Penang. This is a necessary inference deductible from the circumstances of the case.

Counsel submitted that before calling upon the defence the learned judge had no right to accept the evidence of PW1, PW2 and PW5 and to be satisfied that these were witnesses of truth, thereby virtually purporting to shut out any consideration of the defence.

We would think that in the context of the learned judge's grounds as a whole he meant no more than that he accepted the evidence of these three prosecution witnesses as being credible. But perhaps the complaint made may be justified in the light of the language in which the learned judge couched his conclusion on this aspect of the case. Even however accepting that the learned judge in this regard went beyond the parameters of *Haw Tua Tau (supra),* we do not think that on the evidence adduced there was any substantial miscarriage of justice and we think that this is a proper case for the application of the proviso to section 60(1) of the Courts of Judicature Act as indeed this was done by the Federal Court in *Dato Mokhtar Hashim & Anor.* v. *Public Prosecutor.*[3] We might add that *Mokhtar Hashim* was a murder case involving capital punishment and the Federal Court in that case applied the Privy Council decision in *Anderson* v. *R.*[4] to the effect that the proviso can be applied even in cases of murder.

There are a number of other matters raised by

the appellants' counsel, namely:

(1) Whether the combination lock of (P5) was set or not. Here PW2 was called into the witness box several times.
In his examination-in-chief, he simply said that Chambers opened it (p.6). It was in reply to Mr. Karpal Singh's cross-examination that he said that Chambers opened (P5) using combination lock (p.11). But under cross-examination by Mr. Rajasingam he agreed that the combination lock had not been set. (pp. 13 and 15). That this was so is borne out by the evidence of PW5, the Investigation Officer who said that when he received (P5), the combination was at "000" with its key inside it (p.21). But does it matter, in view of the fact that the suitcase (P5) was Chambers' and that he was the one who opened it?
Another point of significance showing that both the appellants had knowledge and control of what was inside (P5) and (P7) is this: It is the refusal by Chambers to open his own bag (P4). His reply to ASP Shahriman's request to open the bag he was carrying was that both the bags, (P3) and (P4), were not his and that these were Barlow's, although in fact only P3 was Barlow's bag and P4 was his. If opening of the bags is based upon ownership, Barlow had no reason to open Chambers' bag (P4). Chambers himself should have opened it and should not have disclaimed it. Instead, Barlow opened it.

(2) Evidence regarding attempt by Barlow at bribing ASP Shariman.
This has never been part of the prosecution case. The evidence came out during one of the re-calls of PW2, when he was being cross-examined by Mr. Rajasingam. Mr. Karpal Singh objected to the admissibility of this evidence not because it was a statement made by Barlow before the arrest, but because the admissibility would be improper and against the principle of natural justice in view of the fact that Mr. Rajasingam had earlier on been acting as solicitor for Barlow. However, Mr. Karpal Singh conceded that Mr. Rajasingam's cross-examination of PW2 on this issue did not amount to a violation of section 126 of the Evidence Act. As far as we are concerned, this evidence is clearly not inadmissible because at the time when the statement relating thereto was made both the appellants were not under arrest yet. In any case it is no part of the prosecution case to rely upon this statement and certainly the learned judge did not appear to have made use of it other than stating it in his grounds of judgment. He certainly made no finding whether such statement was ever made at all.

(3) Refusal by the learned judge to allow cross-examination by Mr. Karpal Singh of PW2 as to his being found guilty in a private summons case. We think that the learned judge was correct to disallow it on the ground of irrelevancy under section 153 of the Evidence Act. Even if he was erroneous on this point, we cannot see how this collateral evidence could affect the case. There is no proposition of law that a convicted person cannot be believed.

(4) The conduct of Barlow at the airport:
Mr. Karpal Singh submitted that Barlow's appearance of being shivering, uneasy and disturbed should not be a ground to infer a guilty knowledge on his part. If this was the only evidence, perhaps the submission might be valid, but the evidence adduced goes considerably further to substantiate the case for the prosecution.

After having considered this evidence and ruled that the defence must answer to the charge, the learned Judge heard the defence evidence. What evidence did the defence adduce?

Each was trying to exculpate himself and blaming the other.

(1) Chambers said that although (P5) was his, he did not put in it (P7) in which the drug was found. He accused Barlow of putting in it not only (P7) but also some of his clothings. The opportunity for Barlow to do so was whilst he was having a bath in the hotel before leaving for Penang International Airport. To show that the whole affair was Barlow's responsibility, he insisted that Barlow did not take a bath after he had taken one. He denied ownership of (P7), or having seen it or being aware of its existence before the incident at the airport. He said that he purchased the suitcase (P5) in order to replace an old brown suit case, which he brought for the journey from Australia to Penang and which he discarded by leaving it in the hotel room on his departure to the airport.

(2) Barlow on the other hand denied putting (P7) into (P5). He denied ownership of (P7) and fur-

ther denied that Chambers ever had an old brown suit case. Instead he claimed that (P7) belonged to Chambers and that Chambers had this bag with him all along from Singapore to Kuala Lumpur and then to Penang. To show that he had nothing to do with putting (P7) and his clothings in (P5) he insisted that he took a bath after Chambers had taken his. He maintained that he had kept his clothings separately and that the reason why some of his clothings were in (P5) was because Police made a mistake during the search at the Police Station and thereby the clothings got mixed up. He said that he carried (P5) because this bag happened to be the first one taken out by the taxi driver when they arrived at Penang International Airport.

The learned judge very carefully examined the defence evidence point by point and in the end came to the conclusion that the defence had not rebutted the presumption that arose and did not raise in his mind any reasonable doubt at all on the prosecution case, nor did it appear to be reasonable or consistent with innocence so as to entitle them or either of them to an acquittal. He accepted the truth of the evidence of PW1, the chemist, PW2 and PW5. In his grounds of judgment, before coming to this conclusion, he dealt at some length with a number of specific issues of fact raised by the defence, such as whether there was or there was not an old brown suitcase, which as Chambers claimed was the one he had travelled with from Australia to Penang, and whether the mixing-up of each other's clothings in (P5) and (P3) was due to the mistake by the police made during the course of police search or whether they were already mixed-up or whether the mixing-up was deliberately done by Chambers.

Looking at the evidence for the defence it would appear to strengthen the case for the prosecution rather than detracting from it.

We find nothing in this appeal on which there could be any justification for us to interfere with the learned judge's findings.

We therefore affirm his finding and uphold the conviction and sentence of both appellants and both the appeals are dismissed. We would like to express our appreciation to the counsel on both sides for the careful arguments addressed to us.

Appeals dismissed.

Solicitors: *Karpal Singh & Co.; R. Rajasingam & Co.*

SEE HUA DAILY NEWS BHD. v. TAN THIEN CHIN & ORS.

[S.C. (Seah, Mohamed Azmi & Wan Hamzah S.C.JJ.) October 14, & December 30, 1985]

[Kuching – Supreme Court Civil Appeal No. 23 of 1985]

Practice and Procedure – Foreign judgment – Judgment obtained in Brunei Darussalam – Enforcement of judgment – Action on judgment at common law – Application for summary judgment – Allegation of fraud held to be frivolous – Application to adduce fresh evidence refused – Judgment should be in Malaysian currency – R.H.C. 1980, O. 14

By a consolidated action, the five respondents brought a claim for damages against the appellants in the High Court at Bandar Seri Begawan, Brunei Darussalm, for libel published in their journal. The appellants were found liable in July 1982 and for each of the respondents damages were assessed in the sum of B$15,000/- (total B$75,000/-) with taxed costs at B$34,192.12 cts. The appellants then appealed against the said judgment to the Brunei Court of Appeal, but it was withdrawn and discontinued on November 17, 1983. The respondents then brought the present action in the High Court at Miri to recover the said judgment totalling B$109,192.12 cts. On December 10, 1984 the High Court at Miri allowed the respondents' application for summary judgment for the sum claimed in Brunei currency under Order 14 RSC 1980, notwithstanding that the appellants had alleged fraud in the Brunei judgment. On appeal to the Supreme Court.

Held, dismissing the appeal: (1) an Order 14 judgment based on a final foreign judgment given on merits by a court of competent jurisdiction can be allowed in a proper case, even if there is allegation of fraud provided the court is satisfied that the fraud alleged is clearly frivolous. In the circumstances of this particular case, it is obvious that the allegation of fraud is frivolous, and the trial judge was justified in treating it as such;

(2) the Miri High Court proceeding was an action on a foreign judgment at common law. Brunei Darussalam is not included in the first schedule to the Reciprocal Enforcement of Judgments Act 1958 and as such the respondents had to file an action on the judgment at common law for enforcement of the foreign judgment in Malaysia;

(3) since the claim is based on foreign judgment at common law, the judgment in Miri should be decreed in Malaysian currency equivalent to B$109,192.12 cts. on the basis of Bank Negara rate of exchange prevailing at the date of the Order 14 Malaysian judgment. Except for this variation the order of the High Court is affirmed.

Cases referred to:

(1) *Wallingford* v. *Mutual Society* (1880) 5 App. Cas. 685, 704.